IN THE

Supreme Court of the United States.

JULIUS A. BELEY ET AL.,
PLAINTIFFS IN ERROR,

v.

JOSEPH NAPHTHALY,
DEFENDANT IN ERROR.

No. 180.

PETITION FOR REHEARING.

Your petitioners, Julius A. Beley, F. Darling, and Charles Dragard, respectfully ask the Court to grant a rehearing in the above-entitled cause, and to set aside and reverse their decision rendered therein February 28, 1898; and, to that end, they respectfully show unto the Court—

1. That, as will more fully appear from the accompanying affidavit, prayed to be taken as a part hereof, and for the reasons therein set forth, certain facts, arguments, and authorities were not called to the attention of the Court, wherefore the Court did not consider or pass upon all of the material points involved in the above-entitled cause.

2. That jurisdiction was not "conferred on the circuit court by joining in one bill against distinct defendants claims no one of which reached the jurisdictional amount"

(Citizens' Bank *v.* Cannon, 164 U. S. 319, and cases cited); and that the amended complaint fails to allege that the value of the tracts, occupied respectively by your petitioners, *separately* exceed the sum of two thousand dollars, or that the matter in dispute as to *each* of your petitioners, exclusive of interest and costs, exceeds the sum of two thousand dollars.

3. That the act of July 23, 1866, which Congress expressly declared to be "An Act to quiet land Titles in California," and upon which, as shown by the amended complaint and recognized by the court, "the plaintiffs' action rests primarily," made it proper and necessary, as the title of the act purports, and because it is remedial in its nature, to bring the above-entitled action in equity by bill and not at law in ejectment, as the pleadings show it was brought and as it is acknowledged even in the brief for defendant in error to have been brought; and that, not having been brought in equity but at law, the circuit court was without jurisdiction in the matter.

NOTE.—In Doolan *v.* Carr, 125 U. S. 618, where the Court held, as shown by the syllabus, that—

"The proper circuit court of the United States has jurisdiction, irrespective of the citizenship of the parties, of an action of ejectment, in which the controversy turns upon the validity of a patent of land from the United States,"

the distinction between ejectment suits and suits in equity was not the question before the court, and, moreover, the statute, under which in that case the patent in question was issued, was not remedial, nor "to quiet titles," but "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean"; wherefore the said decision therein does not form a precedent for the case at bar.

4. That the action being in ejectment and no question of the construction or legality of the act of July 23, 1866, or of the validity of the patents claimed to be issued thereunder being set up *affirmatively* in the amended complaint, said complaint did not present a Federal question, for—

"It must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character" (Metcalf *v.* Watertown, 128 U. S. 586);

that it is not *defences* which *may* be raised that make the suit Federal in its nature, even in equity; and that, moreover, the allegations in the amended complaint *as to what the defendants claim* are not proper *in ejectment*, and were *surplusage*, and the plaintiff cannot avail himself of them; and that the question of jurisdiction may be raised at any time and cannot be waived (Parker *v.* Ramsby, 141 U. S. 81; Mexican Nat. R.R. Co. *v.* Davidson, 157 U. S. 201); nor was it waived (R., p. 5), although neither the courts below nor this court passed upon the question.

5. That the only possible ground for the jurisdiction of the circuit court was the fact that the patent, upon which the ejectment suit was brought, was issued under the act of July 23, 1866, and that the action should have in equity by bill, wherein the complainant *should have alleged that he had complied with the requirements of the act;* and that, in such an action only, was it possible for your petitioners to set up in answer the *equitable* defences impliedly made such by the terms of that act itself.

6. That the patents upon which Naphthaly relied made no mention of the act of July 23, 1866, which act of Congress *only* makes it legal to issue patents in such amounts, and yet they were for $371\frac{40}{100}$ and $566\frac{16}{100}$ acres of land respectively; wherefore they were not valid even *upon*

their face, and wherefore, especially, the suit, in order to give jurisdiction to the circuit court, should have been begun by bill in equity with the above allegations.

7. That Millett *did not assign* to Smith his *right* under the act of July 23, 1866, *to purchase* of the Government the lands in question, nor did Smith to Spring, nor did Spring to Clark, nor did Clark to Naphthaly, the defendant in error; but that each respectively simply *conveyed his Mexican title to the lands*; that five years before Millett conveyed to Smith, the Romero Mexican grant had been declared void by this court; and that it was not Millett nor Smith nor Spring nor Clark, but *Naphthaly*, who (and not until in 1883) made application to the Government to purchase said lands in accordance with the conditions of the act of July 23, 1866.

8. That the act of July 23, 1866, says nothing about the *bona fides* of the "Mexican grantees or assigns," but speaks of the *bona fides* of that person only who purchases lands of "Mexican grantees or assigns," and who becomes the applicant to purchase said lands of the Government (and this person is Naphthaly); wherefore *it is Naphthaly who must be a purchaser of the Mexican grant "in good faith,"* for the act says:

"That where *persons in good faith*, and for a valuable consideration, have *purchased* lands of Mexican grantees or assigns, . . . *such purchasers* may purchase the same . . . at the minimum . . . ."

9. That *Naphthaly was not a bona fide purchaser* because the Mexican grant under which he claimed was purchased by him thirteen years after the final tribunal had declared it void, under which circumstances he could not, in law or in good faith, have supposed it to be valid; for—

"The question is not whether the defendant in fact saw any of the muniments of title [or the decision declaring the grant void], but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected." (Brush *v.* Ware, 15 Pet. 93.)

10. That *aside* from any question of *bona fides*, Naphthaly in his purchase did not conform to another requirement of the act of July 23, 1866, because the grant under which he claimed (admitting for the sake of argument that no actual grant was necessary, or even that he had an actual grant) was not rejected *subsequently* to *his* purchase (but thirteen years before), for that act says:

"Where persons . . . have *purchased* lands of Mexican grantees or assigns, which grants have *subsequently* been rejected . . . *such purchasers* may purchase. . . ."

11. That the court failed to notice, in citing as precedents Thredgill *v.* Pintard, 12 How. 24, and Webster *v.* Luther, 163 U. S. 331, that the subjects-matter there in issue were a pre-emption and a soldier's additional; that *the assignments* of the *right to apply* to the Government therefor were made *as such;* and that the applications there made to the Government were made by the *first*, and only assignee; wherefore, in no sense, are they precedents for the case at bar, and especially in view of the language, to which attention has already been called, of the act of July 23, 1866, which, of course, must be all-controlling in the case at bar.

12. That the court in their opinion recognize that the patents to Naphthaly would be void, and could be declared so, if *he*, the patentee, has not "used, improved, and con-

tinued in the actual possession of the same according to the lines of their original purchase," but their attention was not called to the fact that the form of the action, being at law in ejectment, precluded your petitioners from offering this and other equitable defences, the *possibility* of establishing which ought to be recognized even now in view of paragraph 2 of the accompanying affidavit, prayed to be taken as a part hereof.

13. That though your petitioners admitted they had no title from the Government, they, as will more fully appear from the accompanying affidavit, prayed to be taken as a part hereof, were, and have now been for about twenty years, in possession of the lands in controversy, have raised their families and made the only, and valuable and permanent, improvements thereon and desire to make application therefor of the Government; and that, moreover, under no circumstances, ought this admission to have weighed against them; for—

"The rule in ejectment is that the plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary." (Dick *v.* Foraker, 155 U. S. 414.)

Nor (although, in such a suit, no such admission would have been made, but your petitioners could have offered equitable defences) could such an admission have weighed against them, even had the action been brought, as it should have been, in equity; for—

"A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief. . . . As observed by Mr. Justice Grier in Orton *v.* Smith, 'Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a

court of equity to give them peace or dissipate a cloud on the title.' 18 How. 265." (Dick *v.* Foraker, *supra.*)

And your petitioners respectfully ask that they may be granted an oral hearing.

JULIUS A. BELEY, F. DARLING,
AND CHARLES DRAGARD,
By GEORGE C. HAZELTON,
Their Attorney.

PHILIP TEARE,
of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

JOSIAH H. SMITH, Appellant, *v.* JOSEPH NAPHTHALY, Appellee. } No. 181.

Petition for Rehearing.

Your petitioner, Josiah H. Smith, respectfully asks the court to grant a rehearing in the above-entitled cause and to set aside and reverse their decision rendered therein February 28, 1898; and, to that end, asks that the reasons, so far as applicable, set out in a similar petition filed this day in the case of Julius A. Beley *et al. v.* Joseph Naphthaly, No. 180, may be taken as a part hereof; and respectfully asks that he may be granted an oral hearing.

JOSIAH H. SMITH,
By GEORGE C. HAZELTON,
His Attorney.

PHILIP TEARE,
of Counsel.

I hereby certify that I have read over the foregoing petitions for rehearing in causes Nos. 180 and 181, by me subscribed, and know the contents thereof; and that the same are well founded in law, and are filed in good faith and not for the purposes of delay.

GEO. C. HAZELTON.

SUPREME COURT OF THE UNITED STATES.

JULIUS A. BELEY *et al.*
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JOSEPH NAPHTHALY. } No. 180.

JOSIAH S. SMITH
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JOSEPH NAPHTHALY. } No. 181.

Petition for Rehearing.

DISTRICT OF COLUMBIA,
City of Washington, } *ss:*

Philip Teare, being first duly sworn, deposes and says that he is an attorney at law residing in Oakland, California, and that he was formerly U. S. Attorney for the State of California; that he was the attorney of record for the above-named petitioners up to the time said cases came to this court, and that, since that time, he has been, and now is, the attorney for said parties; but that, not being at that time a member of the bar of this court, Henry F. Crane was engaged to argue said cases before this court; that the deponent furnished certain arguments

and authorities to the said Crane to be embodied by him in his brief to be filed in said causes in this court, but that, on account of his sickness, said Crane failed to embody the same therein, and, moreover, without the authority of said petitioners or deponent, submitted said cases to this court upon his brief filed therein; that your deponent did not know that said arguments and authorities were not included in said brief and did not see a copy thereof, nor did he know that said Crane could not appear in person and argue said cases to this court, until after the decision of this court was rendered therein.

2. That he has often visited the lands involved in this controversy and is well acquainted with them and with said petitioners; that each of said petitioners is in possession of a separate parcel of land amounting to about 160 acres; that they have resided thereon with their families for about twenty years (except the above-named Darling, who has resided thereon for a lesser period); that they have built houses, barns and fences, planted orchards and made other general farming improvements thereon, and that they desire to purchase, or otherwise acquire, said lands of the Government; that said improvements made by them are the only improvements, to the best of deponent's knowledge and belief, ever made upon said lands; that to the best of deponent's knowledge and belief, who has lived in California forty-five years, said Naphthaly never made any permanent improvements and never resided on any of the lands involved in this controversy; that no survey was made of these lands by any one until made by the United States, and that said Naphthaly did not survey the whole or any part of the land in controversy, nor apply to the Government to purchase the same, nor claim the whole, nor any definite parcel thereof, until after said Government survey had

been made and the plats thereof filed in the local offices in California. And further deponent sayeth not.

PHILIP TEARE.

Subscribed and sworn to before me this 31st day of May, 1898.

[SEAL.]

TENNEY ROSS,
Notary Public.